In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1469

RICHARD LAMBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.) is reported at 528 F. 2d 441. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1976. The petition for a writ of certiorari was filed on April 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for a battery committed by one of its employees.

STATEMENT

While petitioner was unloading a shipment of beef at the receiving dock of his employer's plant, William Boslet, a meat inspector for the United States Department of Agriculture then on duty in the plant, suddenly and without warning screamed "boo," pulled petitioner's wool stocking hat over his eyes, climbed on his back and began to ride him piggyback (Pet. App. A-2). As a result of these actions, petitioner fell forward and struck his head on some meat hooks, suffering severe injuries to his mouth and teeth (*ibid.*).

Petitioner instituted this action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), for damages of approximately $14,000. The district court found that Boslet's acts constituted a battery (Pet. App. A-3). Accordingly, it held that it lacked subject matter jurisdiction over the action under 28 U.S.C. 2680(h), which provides that the Federal Tort Claims Act does not apply to "any claims arising out of * * * battery * * * " (Pet. App. A-3).[1]

The court of appeals affirmed the district court's ruling that the meat inspector's act constituted a battery under the law of New York, the place where the incident took place[2] (Pet. App. A-5 to A-6):

> It is hornbook law in New York, as in most other jurisdictions, that the intent which is an

---

[1]28 U.S.C. 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

[2]See *United States* v. *Muniz*, 374 U.S. 150.

BLEED THROUGH

> essential element of the action for battery is the intent to make contact, not to do injury. * * * Since there is not the remotest suggestion that Boslet's leap onto plaintiff's back, his piggy back ride and his use of plaintiff's hat as a blindfold might have been accidental, there was no error in the District Court's determination that it was a battery.

The court rejected petitioner's argument that his claim sounded in negligence (Pet. App. A-3, A-6). Therefore, it affirmed the district court's dismissal of the suit (Pet. App. A-6).

ARGUMENT

1. Petitioner contends (Pet. 2), without supporting argument, that his injury was caused by the negligent or wrongful act of the meat inspector. But the findings of the courts below that his injuries were the result of Boslet's intentional act foreclosure further review of this issue. See, *e.g.*, *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

2. Petitioner also contends (Pet. 2) that 28 U.S.C. 2680(h) does not exclude suit against the United States for a battery where physical harm was not intended. However, as the court of appeals properly held (Pet. App. A-5 to A-7), a battery requires only an intent to make contact, and not to do injury.[3] Therefore, even though the meat inspector did not intend to injure petitioner as a result of his horseplay, the facts

---

[3]Contrary to petitioner's suggestion (Pet. 3), the Federal Tort Claims Act makes no exceptions for "technical" batteries, where injury was not intended as a result of the unconsented touching. As this Court has noted, the plain words Congress has used in limiting the scope of the government's liability cannot be ignored. See *United States* v. *Neustadt*, 366 U.S. 696, 710-711.

alleged in the complaint fell within the common law definition of a battery, one of the intentional torts for which Section 2680(h) exempts the United States from liability.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

DOJ-1976-05